United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 30, 2005

TO : Wayne R. Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 512-9300
512-5024-0100

SUBJECT : The Baltimore Sun 512-5024-2500
Case 5-CA-32186

This case was originally submitted for advice on whether the Employer, a newspaper, unlawfully implemented an ethics code of conduct for unit employees in violation of Section 8(a)(3) and (5) and whether the code independently restricted unlawfully employees' Section 7 rights in violation of Section 8(a)(1). By Regional Advice Memorandum of June 27, 2005, it was concluded that this charge should be dismissed, absent withdrawal, as (1) the code was implemented lawfully where the Charging Party Union had waived its right to bargain over the terms of the code and (2) that the code provisions themselves did not constitute independently unlawful restrictions upon the employees' exercise of Section 7 rights.

The Region resubmitted this case for reconsideration of certain code provisions that require employees to report to the Employer, incidents in which they or their co-workers engage in activities that create actual or potential conflicts of interest or that are unlawful or unethical conduct. The Union argues that those provisions constitute impermissible surveillance or the impression of surveillance of employees' protected concerted activities in violation of Section 8(a)(1) of the Act.

It was concluded that there is no merit to the Union's request for reconsideration and that the instant charge should be dismissed, absent withdrawal.

BACKGROUND AND FACTS

The basic underlying facts and the various Employer ethics code provisions at issue are set forth in the Regional Advice Memorandum of June 27. With reference to its request for reconsideration, the Union cites in particular to the following sections of the Employer's code of ethics:

II.5. CONFLICTS OF INTEREST

> * * * *
> Failure to disclose an actual or potential conflict of interest is a violation of the Code.****Any employee who becomes aware of a conflict or potential conflict should bring it to the attention of a supervisor, manager or other appropriate personnel or consult the procedures described in Part II.12 of the Code.
>
> II.11 REPORTING ANY ILLEGAL OR UNETHICAL BEHAVIOR
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> Employees should talk to supervisors, managers or other appropriate personnel about observed illegal or unethical behavior and when in doubt about the best course of action in a particular situation.
> ****
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> III. NEWSROOM AND EDITORIAL DEPARTMENT ETHICS
> [Preamble]
> ****
> ...[A]ny staff member who is aware of potential ethical problems – whether it involves their own activities or those of a colleague – has an obligation to notify a supervising editor and/or the Public Editor immediately.

The Union also relies on certain evidence surrounding the parties' 2004 negotiations over the code provisions. One witness states that at a negotiating session of August 11, 2004, the reporting requirements of the code were discussed:

> At this meeting, there were several questions and discussions regarding restrictions on picketing. This discussion involved picketing at locations other than the Sun. [A management representative] said all such activities by an employee would need to be disclosed in advance.

This witness also states that during a bargaining session of August 18, 2004, the scope of the code was discussed:

> There was another discussion centered around Section 7 rights in a situation outside the Sun. This also covered first amendment rights. [A union representative] said protesting at Comcast would be protected by Section 7. [An employer representative] said the code would prohibit this conduct.

Another Union witness also states that during the 2004 negotiations the following exchange took place:

> One of the other fundamental concerns we raised in that you can act ethically but not get permission to do so first. We said, under this policy, you could still get in trouble. [An employer representative] said that under that example, an employee could get into trouble for not reporting in advance. Conversely, you could do something clearly unethical, but your supervisor said you could do it, and you would not get in trouble.

Based upon this evidence,[1] the Union argues that the Employer will construe these code provisions in an overly broad manner that will impermissibly interfere with employees' Section 7 rights. It alleges that the cited provisions constitute unlawful Employer surveillance or the impression of Employer surveillance of employees' protected concerted activities. The Union also argues that the reporting provisions represent an egregious attempt by the Employer to monitor and control the protected concerted activities of its workforce.[2] Thus, the Union asks for reconsideration of the 8(a)(1) aspects of this charge.

The Union has not, however, offered evidence that the Employer has, since its September 2004 implementation, enforced its ethics code in a manner that interfered with employees' Section 7 rights or did not vindicate its legitimate and substantial business interest to prevent conflicts of interest and unethical conduct of its employees. Thus, there is no evidence that any unit employee has been disciplined for engaging in Section 7 activities where there was no actual or potential conflict of interest. Similarly, there is no evidence that any employee has been disciplined for engaging in Section 7

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[1] In the Union's position statement of February 17, 2005, the Union related the experiences of two Baltimore Sun reporters who, it asserted, were confused as to the scope of the ethics code. As described by the Union, the situations did not appear to involve employees' protected concerted activities where there was no conflict of interest or potential conflict. Further, these situations did not involve the Employer's denial of permission to the employee to participate in the activity or the imposition of discipline after the fact, based upon the employee's failure to obtain prior Employer permission. The Union did not reiterate the experiences of these reporters in its August 22, 2005 request for reconsideration.

[2] See Union's position statement of August 22, 2005, at p. 9.

activities where prior permission was not secured from an Employer supervisor or manager.

The Region recommends that a Section 8(a)(1) complaint should issue, based on the view that the reporting provisions of the Employer's code of ethics impermissibly interferes with unit employees' Section 7 activities by constituting Employer surveillance or creating the impression of Employer surveillance.

ACTION

The instant charge should be dismissed, absent withdrawal. We adhere to our original conclusion that the provisions of the Employer's ethics code are facially valid regarding their actual or potential impact on the unit employees' exercise of Section 7 rights. We also conclude that there is insufficient evidence that the Employer has applied the code in a manner that unlawfully restricts the Section 7 rights of unit employees. Thus, there is no merit to the Union's argument that the reporting provisions of its ethics code is unlawful surveillance or creates the impression of surveillance.

The Charging Party Union's arguments do not alter our original decision that the Employer's ethics code does not on its face impermissibly interfere with employees' Section 7 rights. We have reviewed the various code provisions under the Board's existing procedures governing the evaluation of an employer's work rule, i.e., the challenged rule must be given a reasonable reading, the provisions or phrases at issue must not be read in isolation; there is no presumption that the rule was intended to interfere with employee statutory rights; and to the extent that a rule, reasonably construed, interferes with Section 7 rights, does the employer advance a legitimate and substantial business justification for maintaining the rule.[3]

In our original Memorandum we concluded that a reasonable reading of the code does not require unit employees to disclose all of their Section 7 activities, but only those they believe create an actual or potential conflict of interest because of their work assignments.[4]

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[3] See Guardsmark, LLC, 344 NLRB No. 97, sl. op. at 1 (2005); California Newspapers Partnership d/b/a ANG Newspapers, 343 NLRB No. 69, sl. op. at 2 (2004).

[4] See p. 13 of the June 27 Advice Memorandum.

Further, the Employer has a legitimate and substantial business justification, as a newspaper, to prevent coverage of the news by reporters with actual or potential conflicts of interest.[5] To the extent the code's pre-activity reporting provisions solicited employees to report Section 7 activities that do not present a conflict or apparent conflict, we viewed them as merely permissible "safe harbor" provisions of which employees may take advantage.

The Union raises three arguments in support of its request for reconsideration. First, it argues that the code is overly broad and not justified by any legitimate business interests, because it requires employees to report situations presenting "potential" conflicts, not just actual conflicts of interest.[6] Second, it argues that the statements made by Employer managers during the 2004 negotiations indicate that employees must get prior permission to engage in all Section 7 activities.[7] Third, it argues that the code is overly broad, since it covers newsroom employees not directly involved in news reporting on a particular matter that may present a conflict.[8] We conclude that there is no merit to the Union's three arguments.

With regard to the first argument, we see no substantial difference between the code's term of "potential" conflicts of interest and an "apparent" conflict. We adhere to our initial conclusion that the Employer has a substantial and legitimate business justification as a newspaper to avoid not only actual conflicts of interest, but even the appearance of conflicts of interests, to protect its core entrepreneurial editorial integrity.[9] Thus, the code may legitimately require

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[5] Id., at p. 14, citing California Newspapers Partnership d/b/a ANG Newspapers, 343 NLRB No. 69, sl. op. at 2. The bargaining unit herein includes, inter alia, reporters, editors and photographers.

[6] See Union's position statement of August 22, 2005, at pp. 5 and 7.

[7] Id., at pp. 3, 4, and 7.

[8] Id., at pp. 8, n. 13 and 4 and n. 7.

[9] See Peerless Publications, Inc., 283 NLRB 334, 335 (1987), on remand from Newspaper Guild Local 10 (Peerless Publications, Inc.) v. NLRB, 636 F.2d 550, 560-561 (D.C. Cir. 1980).

employees to report apparent or potential conflicts of interest.[10]

The Union's second argument is that the code subjects employees to discipline for not reporting all Section 7 activities even if the conduct does not violate the code, i.e., even where the employees' activities do not constitute a conflict of interest or an apparent conflict. The Union also notes that the Employer would be the sole judge of whether the conduct violates the code.[11] The Union relies upon the Employer comments made during the 2004 negotiations over the code.

We conclude that this argument lacks merit. First, the code itself does not reflect that it covers all Section 7 activities, but only those that pose actual or potential conflicts of interest. See in particular Part II, para. 5 and Part III [preamble]. Second, the evidence of the Employer's comments during the 2004 negotiations is insufficient to establish that the Employer is currently interpreting the code in an unlawful, overly broad manner that interferes with employees' Section 7 rights which is not warranted by any legitimate and substantial business justification.[12] The Union has not adduced any evidence that the Employer has enforced the code in an unqualified manner as contemplated by the Union. Thus, no employee has been disciplined for engaging in Section 7 activity, or for failing to receive prior permission from management, where there was no actual or potential conflict of interest.[13]

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[10] See Peerless Publishing, Inc., 283 NLRB at 335.

[11] See Union's position statement of August 22, 2005, at p. 9 (". . . [The Employer] has arrogated to itself a role as an observatory – indeed, a clearing house – over all employee proposed or actual concerted activity").

[12] Compare Cintas Corp., 344 NLRB No. 118 (2005)(8(a)(1) violation for employer to maintain work rule that has "unqualified" prohibition against employee release of information regarding the employer's partners, as such rule could reasonably be construed by employees to prohibit employees from discussing their wages and other working conditions among themselves).

[13] If the Employer enforces the code in a manner that interferes with Section 7 rights which is not warranted by a legitimate and substantial business justification, such conduct would arguably violate Section 8(a)(1), even if the code is facially valid. Cf. Reno Hilton Resorts d/b/a Reno Hilton, 320 NLRB 197, 208 (1995)(discriminatory application of facially valid no-solicitation rule).

Finally, there is no merit to the Union's third argument that the Employer's legitimate interest in the editorial integrity of the newspaper extends only to employees actually reporting or editing a story that presents a conflict. The Union notes that the unit includes photographers, library employees, graphic artists and photo technicians in the newsroom as well as reporters, editors and copy persons. It argues that the code improperly covers all employees in the newsroom, regardless of job description.[14] We conclude that the Employer's legitimate and substantial interest in the editorial integrity of the newspaper is not limited to preventing conflicts only in reporters covering a particular story. Rather, all employees in the newsroom contribute to the Employer's editorial position. Accordingly, we conclude the Employer is justified in extending its Code of Ethics to all such employees.[15]

In these circumstances, we conclude that the reporting provisions of the Employer's code of ethics do not constitute unlawful surveillance or the impression of surveillance of unit employees' Section 7 activities.[16]

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[14] See Union's position statement of August 22, 2005, at p. 4, n. 7 and p. 8, n. 13.

[15] Cf. California Newspapers Partnership d/b/a ANG Newspapers, 343 NLRB No. 69, sl. op. at 1, 3 and n. 8 (newspaper did not violate 8(a)(1) when it discussed a possible appearance of a conflict of interest with an employee reporter about his appearance before a city council; editorial integrity business justification is core purpose of newspaper and was applicable to unit of reporters, editors and other editorial personnel; no evidence that employer's discussion with reporter was reflective of broad policy that would apply to all employees, citing Peerless Publications, Inc., 283 NLRB at 336).

We note that the recognition clause of the parties' contact includes a commercial department in the bargaining unit. Part II of the Code is applicable to all employees. Part III is applicable only to Newsroom and Editorial Staff. In its request for reconsideration, the Union does not argue that the Code is unlawful with respect to employees in the commercial department.

[16] The cases relied upon by the Region all involve situations where the employer's conduct constituted classic creation of the impression of employer surveillance of

Thus, there is no basis to change the disposition of the charge as set forth in the Advice Memorandum of June 27, 2005.

B.J.K.

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employee protected activities which was not warranted by a legitimate and substantial business justification. Compare, e.g., Martech Medical Products, 331 NLRB 487, n. 4 (2000).